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NEUTRAL RIGHTS UPON THE SEAS

BY FREDERIC R. COUDERT,
New York.

Mankind is ever prone to be the victim of phrases, and as the march of democracy progresses and the rule of the newspaper is substituted in the non-Teutonic world for the rule of the sword, men ever grow more susceptible to word formulas.

Since the beginning of this war much has been said about the "Freedom of the Seas." No one has defined the term with precision and nearly everybody seems to have been content to discuss it without a definition. It is not a technical phrase. It has never been defined either in law or in politics, and like all phrases relating to freedom, the latitude of interpretation is a wide one. It appears to have conjured up different images at different epochs. When Grotius wrote *Mare Liberum* the freedom which he contemplated was the freedom from the dominion of the Portuguese who claimed to exercise sovereignty over great portions of the ocean. The Portuguese claim died a natural death with the evanescence of Portuguese power. The declaration of Alexander VI dividing the world between Spain and Portugal now seems grotesque, but had its value in lessening conflicts on land and sea. Like the Portuguese claims it has passed away as one of the curios of history.

In the eighteenth century, restrictive navigation laws preventing trade by foreigners with Spanish, French or English colonies were the subject of considerable international discussion. These laws then seemed to men to interfere with the natural course of foreign trade and the term "Freedom of the Seas" as then used must be read in relation to them. With the American Revolution and the destruction of the domination of Spain in South America these old navigation laws disappeared, and possess today mere historic interest. During the War of 1812 the American slogan was *free trade and sailors' rights*; free trade not meaning absence of a protective tariff, but rather freedom of the neutrals to trade upon the high seas subject only to the usual exercise of belligerent rights and unmolested by visitation of their ships for the removal of alleged British subjects.

The open sea is now free to the vessels of all nations. In times of peace, Germany, which now clamors so loudly for the freedom of the seas, found markets the world over and successfully competed with Great Britain and France in every port of the world, building up in an incredibly short time a great merchant fleet.

The phrase in the minds of international lawyers really means but one thing. In time of war it has always been recognized that belligerents possess certain rights to interfere with neutral goods and neutral ships upon the high seas. These rights, with the lapse of time, and with the growth of nations, became more or less definitely fixed. It was in defense of neutral rights that the War of 1812 was fought and it was in defense of neutral rights that the series of reprisals between France and the United States from 1797 to 1800 took place.

The general principles of the freedom of the seas used in this, the only accurate sense in which it can be used, are simple. The belligerent has the right to blockade all the ports of his enemy, thus cutting off egress and ingress. Such blockade must not be a mere pretext enabling him occasionally to seize vessels on the high seas, but must be really effective. This is a rule of common sense, as a paper blockade would be vexatious and indecisive. Sea commerce is necessary to the life of enemy countries. Nations possessing sea power would be at a great disadvantage were it not possible to use this power to cut off the trade of those nations having preponderant military power. Thus, in addition to blockade, there is the law of contraband. A belligerent may visit and search neutral ships in order to discover whether they are bringing to the enemy materials useful or available for war purposes. The principle was ever simple; the application difficult, for there was no general consensus as to the list of articles constituting contraband. Early treaties between France, Great Britain, Spain and Holland endeavored, but always unsatisfactorily, to agree upon the list; provisions were sometimes included; gun powder, guns and things immediately useful in war were always included. Lists rapidly became obsolete with changes in warfare and there being no international body capable of fixing definitely such list, each nation declared contraband that which it wished to prevent being carried to the enemy. The neutrals naturally opposed the extension of the list, the bellig-

erent as naturally desired to extend it. This conflict in interests is inevitable.

The Declaration of London endeavored to fix a happy solution. The list contained the three classes:

1. Those things useful in war.
2. Things useful in time of both peace and war, and
3. Things only useful for peaceful purposes.

The declaration was not adopted by the nations and Germany and the Entente Powers have kept adding to their list of contraband until almost every article is included. The distinction between absolute and conditional contraband has, owing to the militarization of total populations, broken down in practice. Old principles have been applied to new situations, and the result has been admittedly vexatious to the neutrals. These changes in conditions have justified the application of the old principles to cases in which they would formerly have been inapplicable. It would have been absurd to have allowed goods to pass freely from Holland or Scandinavia into Germany on the ground that these ports were thereby blockaded. To have so held would have been a practical abrogation of the right of blockade. Precedent was found in the practices employed by the United States during the Civil War and sanctioned by the supreme court notably in the cases of *The Springbok*, *The Peterhoff* and others.

Of late years there has been a movement to establish freedom of private property on the high seas and to prescribe that enemy property shall no longer be the subject of destruction. None of these plans, however, contemplates the abolition of blockade and contraband; hence, they are really of little more than academic value or interest. While the belligerents may extend contraband lists at will, it is useless to discuss the immunity of private property on the high seas.

Recent events have demonstrated how little value attaches to private property in districts occupied by an enemy. Aside from intentional and lawless destruction, requisitions made upon the hapless inhabitants quickly destroy all value that their property may have. The inhabitants of northern France and Belgium may still have a theoretical right to the lands upon which they live, but this right is little more than academic; they have been ruthlessly

cut off from all means of livelihood, and in many cases they themselves have been deported.

Until the nations can reach some definite agreement, like the Declaration of London, and provide some force back of it, the conceptions of blockade and contraband will seriously interfere, as they have always done, with neutral rights. There will always be irreconcilable differences of opinion based upon divergence of interest between belligerent and neutral.

There are, however, certain other limitations upon even the freedom of the seas as understood by the law of nations. These limitations are of a humanitarian character, and up to the present conflict have been very generally respected. The destruction of ships without preliminary visit and search is without basis in law and can have no justification. The plea of a nation employing it that it is battling for the freedom of the seas is not devoid of elements of humor.

But what of the future? What does the President of the United States mean when he speaks of the "Freedom of the Seas"? Is it an almost impossible iridescent dream, or may something be done so to safeguard future rights of neutrals that the seas will be open to trade free from blockade and contraband? This will depend upon whether some sort of world reorganization takes place. So long as the existing situation continues it will be impossible to obtain satisfactory guarantees for neutrals, nor am I sure that this is desirable. Modern invention has brought the nations of the world so close together that none of them can afford to remain indifferent to any great conflict; such conflict must now too deeply affect their interests to permit of an attitude of aloofness.

The present rules of the sea in times of war are derivatives from the existing system of independent nations, each theoretically equal and subject to no higher law. I believe this system to be in gradual process of disappearance. Some great combination of the nations will take place, and provision will be made for declaring outlaw the nations violating the world's peace. In that event, there will be a trusteeship of sea power, and the enlightened nations of the world forming some combination will deal with the offending nation as the police deal with the burglar. No question of belligerent rights can then arise.

This day may not be so far distant as we now think, for the world war is largely changing the mental outlook of vast masses

of people. America will doubtless wish to take part in some great movement which, by creating a better world system, will eliminate the old differences and dangers to the peaceful neutral and will lead to a new "Freedom of the Seas," guaranteed not by phrases without force, but by the trusteeship of the sea power of the great enlightened democracies of the future.

It is, perhaps, such a "Freedom of the Seas" that the President of the United States had in his mind in his eloquent address to the Senate on a League of Peace designed to create a new and a better international condition.

The United States will be forced by circumstances out of its supposed isolation and must take active part with the great powers of Europe in establishing the world's destiny. Some arrangement with the democracies of France, Great Britain and, perhaps, Russia for the settlement of the innumerable international disputes growing out of trade rivalries and undeveloped territory must be made. This is the work of the immediate future. Some trusteeship of land and sea power, for the promotion of peaceful relations among the nations of the world, must ultimately be found, as existing law does not and cannot furnish the basis for the settlement of future controversies; such a combination or super-alliance must busy itself with the formulation of a policy. This policy must include the recognition of the duties as well as the rights involved in the *Monroe Doctrine*, and proper provision for the maintenance of the *Open Door* in the East and elsewhere among economically and politically inferior people. The attempt made by European powers after 1815, which resulted so unfortunately in the Holy Alliance, must be renewed on a broader, sounder basis. In such an arrangement, America must willingly, and for the protection of its own interests, play a great, if not a predominant, part.

Freedom of the seas has been talked about by a great many people, mainly by the people who apologized for making the land free for spoliation and assassination. The gentle Prussians who so amiably shoot civilians right and left in France and Belgium and who deport women are quite given to talking of the freedom of the seas and of arraigning so-called British navalism. Of course, these arguments do not carry great weight. What the German advocates really object to is the great naval power of Great Britain, and they will object still more when our own naval power, pretty effec-

tive in its own way, is added, and takes upon itself the task of restraining a great war-mad autocracy which, if left free on the sea to obtain needful supplies from the neutral world, would after half a century of preparation have been able to exterminate all the populations that they did not like and thus Prussianize the world. That is what they meant by a free sea—one upon which their plans cannot be frustrated.

And so, indeed, they might have carried out to completion their procedure in France and elsewhere in the world if their idea of a free sea, a sea on which maritime powers like Great Britain and the United States could not possibly act effectively, had been the law. Fortunately, it was not the law. Men have decreed a long time since that war might be carried on upon the sea as upon the land, and so, indeed, it has been; and if there be any real Americans remaining in the United States to whom the spectre of British navalism, so fostered by the German propaganda, means anything, I would like them to judge the matter intelligently, not from the standpoint of prize court decisions, but rather from the standpoint of history.

On two great occasions in the last hundred years or so, British navalism has saved the continent of Europe. In the first place from the domination of Napoleon. In many respects I sympathize with the aspirations with which Napoleon began on his career, and we must not forget that wherever the eagles went he carried his great code. But, as Seeley says, after 1807 the aspirations of the revolution were satisfied in France, they had run their natural limit in Europe, and Napoleon's ambitions had become personal and selfish. Then it was that British navalism prevented a despotism that might have crushed out national life in Europe. Again, history seemingly repeating itself, it was the great British fleet—I happened to see it in the Channel, I remember, in late July, 1914, drawn up there as it were, almost by a miraculous accident—that saved England and, in fact, civilization, from the monster system that so ruthlessly destroyed Serbia, Montenegro and Belgium, and is in the process of blighting and destroying everything that the human mind and human soul has heretofore held dear.

Now, as to the future. If it may be said that it is not safe to leave the great sea power in the hands of one nation, even though history indicates that that nation on the whole has carried out its trusteeship well and in accordance with freedom and the betterment

of mankind, then indeed we must change the whole world system. Instead of nations being isolated units, we will have to have a combination of nations.

I have advocated from the beginning of the war, although I am in no degree an "Anglomaniac," an understanding—call it a combination if you wish—it is not necessary or advisable to enter into a formal alliance—between the English-speaking democracies of the world who have such similar institutions and a common language, although the latter is sometimes a disadvantage, because they can read each other's newspapers which often creates irritation—people who look to the same common law while their lawyers talk in the jargon of Blackstone and have the same fundamental postulates of liberty, right and decency. Today this is about to be realized, although a year or two ago it might have seemed an almost hopeless aspiration.

Today the English-speaking commonwealths and the French republics drawing to themselves the other democracies of the world, just as the magnet attracts the iron filings, must stand together and may in time create something in the nature, to use a much-abused and perhaps misleading term, of a super-state, which super-state can act as the interpreter of those common aspirations for peace and justice of the world; and then the freedom of the sea will mean that kind of freedom which we enjoy in the streets of Philadelphia and in the streets of New York, that freedom which a regulated community maintains because the police are there to repress by law, without hatred but with the maximum of celerity and effectiveness, those who would break the law; the great Anglo-French-American combination, commanding the spiritual and material forces of those nations, would insure a freedom of the sea which would mean a free sea for all who wished to travel and trade thereon, but when any nation attempted to interfere with the orderly life of other communities, it would have to reckon with that great democratic force, which would try it and finding it wanting would suppress not its freedom, but its lawlessness.

That may be something of a prophecy, but today we have ceased from a miserable, pusillanimous neutrality that seemed immoral and that was rapidly becoming dangerous for our future; we have stepped out from a selfish isolation into coöperation with the great progressive forces of the world; there is now every reason to believe that we will tend to realize the dream of old-time idealists

and philosophers and create a new order out of which minor incidents, such as the freedom of the seas, will naturally flow to aid mankind in his efforts for the only real peace, that which is based upon law and justice.

When we abandoned neutrality, we struck a great blow for the existence of law, not any particular law, but all law. We did not haggle about rules that lawyers had made as to ultimate destination and continuous voyage; the lawyers could wrangle about that forever. In the Civil War we took one view because it was to our interest and we sustained it by the action of lawyers before an arbitration board; we might do it again if proper counsel was retained. We recently took another view as to our relations as neutrals because our interest dictated something different. We did not do it with any real heart in it. We did not mean to fight over it. There was no necessity for doing so. We distinguished between mere rights that could be paid for in money and adjusted by a court, and the sacred rights of human life; those rights which ordinary people call "God-given rights" and scientists call by some other name but which means exactly the same thing.

FREEDOM OF THE SEAS¹

BY CHANDLER P. ANDERSON,
New York.

In this discussion "the freedom of the seas" will be considered in relation to the general subject of "America's obligations as the defender of international right," and will be treated as relating to the obligations of the United States, while a neutral in the present war, to defend international right in regard to the freedom of the seas.

It should be noted in passing that although the phrase "freedom of the seas" has played a prominent part in discussions relating to the essential conditions for an enduring peace, there has been no controversy in recent years about the freedom of the seas in time of peace. Under peace conditions in modern times all the waters of the earth, which, by reason of their geographical situation, can properly be regarded as parts of the high seas, have been free to

¹ Prepared before the United States entered the war.